EPA Questions related to LDNR's Class VI Primacy Application

Background: We need to address the following questions related to LDNR's Class VI primacy application. The bullets under each question provide relevant background.

1. What is the applicable statute of limitations to commence a civil action for violations?
    - 28 U.S.C. § 2462; "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

    LDNR: Louisiana's civil enforcement authority for UIC is imprescriptible. Louisiana Constitution art. 12, section 13, states "Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law." Because there is no specific prescriptive period established in law for civil enforcement actions for Class VI (or any other UIC or Office of Conservation) requirements, civil prescription does not run against the State. This has been recently recognized by the Louisiana Supreme Court in the case State of Louisiana, ex rel. Tureau vs. BEPCO, et seq., 2021-C-00856 (La., October 21, 2022), wherein the Court determined that a citizen suit to enjoin activities alleged to violate the Commissioner of Conservation's regulations "is not subject to liberative prescription."

2. What is the applicable statute of limitations to commence a criminal action for violations?
    - 18 U.S.C. § 3282; "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found, or the information is instituted within five years next after such offense shall have been committed."

    LNDR: The statute of limitations for criminal prosecution under Louisiana law depends on the severity of the crime and the legally authorized level of punishment associated with it. For instance, La. C.Cr.P. Tit. XVII, art. 572, states in part,

    > "A. Except as provided in Articles 571 and 571.1, no person shall be prosecuted, tried, or punished for an offense not punishable by death or life imprisonment, unless the prosecution is instituted within the following periods of time after the offense has been committed:
    >
    > (1) Six years, for a felony necessarily punishable by imprisonment at hard labor.
    >
    > (2) Four years, for a felony not necessarily punishable by imprisonment at hard labor.
    >
    > (3) Two years, for a misdemeanor punishable by a fine, or imprisonment, or both.
    >
    > (4) Six months, for a misdemeanor punishable only by a fine or forfeiture."

The level of criminal punishment for violations of Class VI regulations would appear to depend on the specific criminal violation implicated. But it does appear that in some cases a statute of limitations as low as 4 or even 2 years may be possible.

Despite this difference, Louisiana's program remains as stringent as the federal Class VI program. Even when the two-year limitation is applicable to a criminal enforcement action, it is adequate to compel compliance with the State's Class VI program's regulations as has been EPA's determination for all of Louisiana's UIC program regulations to date.

The Department further commits to refer all criminal violations of its Class VI program to the appropriate district attorney or Attorney General to allow prosecution within the applicable statute of limitation.

Finally, if in rare circumstances criminal prosecution of a Class VI violation by the State is somehow determined to be outside an applicable statute of limitation, EPA's oversight and direct criminal enforcement authority would be unaffected. See 42 U.S.C. § 300h—2(a)-(b). This situation was previously recognized by EPA and Louisiana in Addendum 1 to section IV(c) of the MOA between the two. In such rare instances where a target for criminal prosecution possesses a valid defense at the State level not found at the federal level, Louisiana commits to work closely with EPA on any federal criminal prosecution.

3. Will/does the State Director make available information on reporting procedures for the public to submit information about violations?
    - As stated in your MOA Addendum 1, Sec. III.E. (p. 5) and Program Description, Sec. 5 (pp. 8-9) "The LDNR shall provide the opportunity for the public to submit information on violations and shall have procedures for receiving, investigating, and ensuring proper consideration of the information."
    - The state's compliance monitoring program includes the following activities: [...] Investigating complaints alleging improper construction, completion, operation or maintenance of a GS project.
    - 40 CFR 145.12 (b)(4) The State shall maintain: "Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged and the State Director shall make available information on reporting procedures"

LDNR: Please see the attached Policy No. IMD-GS-12 and UIC Incident Report. Policy No. IMD-GS-10 details the reporting procedures for potential UIC incidents. The UIC Incident Report is adapted from the US EPA's Enforcement and Compliance History Online (ECHO) environmental violations tool.

4. What is the burden of proof for establishing civil violations? What is the degree of knowledge or intent required for establishing civil violations? What is the burden of proof for establishing criminal violations?
    - 40 CFR 145.13(b)(2): The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the Safe Drinking Water Act

- The federal burden for establishing civil violations is the preponderance of the evidence and there is no degree of knowledge or intent requirement.
- The federal burden for establishing criminal violations is beyond a reasonable doubt. Burden of proof for criminal prosecution in Louisiana is proof beyond a reasonable doubt.

LNDR: The burden of proof for civil violations in Louisiana is preponderance of the evidence, which is equivalent to the federal standard. See Rivera v. United Gas Pipeline Co., 96-502 (La. App. 5 Cir. 6/30/97), 697 So. 2d 327, 335, writ denied 97-2030 (La. 12/12/97) 704 So. 2d 1196, and writ denied, 97-2031 (La. 12/12/97), 704 So. 2d 1197, and writ denied, 97-2032 (La. 12/12/97, 704 So. 2d 1197, and writ denied, 97-2034 (La. 12/12/97), 704 So. 2d 1197.

For civil violations, Louisiana's knowledge requirement is no knowledge, which is equivalent to the federal standard. See R.S. 15:271

For criminal violations, Louisiana's burden of proof is beyond a reasonable doubt, which is equivalent to the federal standard. See R.S. 15:271.

The knowledge requirement for certain criminal violations in Louisiana is "knowingly and willfully." La. R.S. 30:18(A)(2). While the federal requirement is "willfully," 42 U.S.C. § 300h—2(b)(2), courts have interpreted "willfully" as used in this section to require knowledge. See United States v. King, 660 F.3d 1071, 1078 (9th Cir. 2011). Therefore, the State views these standards as equivalent.

5. What is the State's provision for public participation in the enforcement process? Is there intervention allowed as of right to any civil or administrative action by a party having an interest in the action? Or, can Louisiana provide assurance that it will investigate and respond in writing to citizen complaints; not oppose intervention when permissive intervention is required; and publish notice and provide at least 30 days for public comment on any proposed enforcement settlement?
    - La. R.S. 30:1105.C; "Any interested person has the right to have the commissioner call a hearing for the purpose of taking action in respect to a matter within the jurisdiction of the commissioner as provided in this Section by making a request therefor in writing and paying the hearing fee set by the commissioner, as provided by law for hearing conducted pursuant to R.S. 30:6. Upon receiving the request and payment of the required fees the commissioner shall promptly call a hearing. After the hearing and with all convenient speed and within thirty days after the conclusion of the hearing, the commissioner shall take whatever action he deems appropriate with regard to the subject matter."
    - 40 CFR 145.13(d): Any State administering a program shall provide for public participation in the State enforcement process by providing either: (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraph (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or (2) Assurance that the State agency or enforcement authority will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 145.12(b)(4); (ii) Not

oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

LNDR: For administrative actions, any interested person has a right to a hearing before the commissioner on matters under his jurisdiction. See La. R.S. 30:1105.C. Interventions in Louisiana's civil courts are authorized only when a justiciable right exists and the right has connexity with the facts, circumstances, and objects of the main demand. (See Harrison v. Gaylord's Nat'l Corp., 539 So.2d 909 (La. App. 4th Cir. 1989) also see La. C.C.P. art. 1091). Despite the fact that Louisiana law describes rights of intervention in civil matters differently than the federal rules of civil procedure, it seems very unlikely that a Louisiana Court would deny intervention to anyone given an unconditional right to intervene pursuant to Rule 24(a)(1) of the Federal Rules of Civil Procedure in a case involving violations of a federal statute, namely, the Safe Drinking Water Act. Finally, members of the public are authorized to bring enforcement suits themselves if the Commissioner fails to enforce after being provided notice of any violation. See R.S. 30:16.

In order to avoid any doubt, in addition to the above authorization for interested parties to participate in administrative and civil enforcement actions, LDNR will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 145.12(b)(4); (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

6. EPA needs clarification on how LDNR's transfer of liability provisions fit together with UIC site closure requirements including how these provisions prevent endangerment to USDWs.

   Background:

   - LA Class VI rule: (§3633.B) refers to a Certificate of Completion "The commissioner shall not issue a certificate of completion pursuant to R.S. 1109 unless the operator has sufficient financial surety with the Office of Conservation to adequately close the facility, plug all existing wells, and provide for post injection site care and site closure."
   - LA R.S. 30:1109.A.1. states "Ten years, or any other time frame established by rule, after cessation of injection into a storage facility, the commissioner shall issue a certificate of completion of injection operations, ***upon a showing by the storage operator that the reservoir is reasonably expected to retain mechanical integrity and the carbon dioxide will reasonably remain emplaced,*** at which time ownership to the remaining project including the stored carbon dioxide transfers to the state. Upon the issuance of the certificate of completion of injection operations, the storage operator, all generators of any injected carbon dioxide, all owners of carbon dioxide stored in the storage facility, and all owners otherwise having any interest in the storage facility, ***shall be released from any and all duties or obligations under this Chapter and any and all liability***

associated with or related to that storage facility which arises after the issuance of the certificate of completion of injection operations.

- 40 CFR 146.93(b.1-4) require that owners or operators conduct monitoring following the cessation of injection until they can provide ***"substantial evidence" that the geologic sequestration project no longer poses an endangerment to USDWs.*** This monitoring period is referred to as the "post-injection site care" period and is generally set for at least 50 years, unless the owner or operator can make a site-specific alternative timeframe demonstration, based on monitoring, modeling and other site-specific data, that the geologic sequestration project no longer poses an endangerment to USDWs. After the post injection site care period and prior to authorization for site closure, owners or operators must submit for review and approval a demonstration, based on monitoring and other site-specific data, that no additional monitoring is needed to ensure that the geologic sequestration project does not pose an endangerment to USDWs. Owners and operators are required to ***have qualifying financial responsibility instruments sufficient to cover the cost of meeting the requirements of all aspects of the Class VI permitting including the post injection site care and site closure period***. 40 CFR 146.85(a)(2)(iii) and Louisiana equivalent at 43 La. Admin. Code Pt XVII, 609.C.4.a; see also 146.85(b)(1)("The owner or operator must maintain financial responsibility and resources until: (i) The Director receives and approves the completed post-injection site care and site closure plan; and (ii) The Director approves site closure.") and the Louisiana equivalent at 43 La. Admin. Code Pt XVII, 609.C.4.f.
- September 2020: LDNR clarified the CDGSTF is separate from instruments of financial surety required under the commissioner's UIC authority. Its intended uses include funding program administration and covering any activities that may take place after the site is closed and the commissioner has issued a certificate of completion of injection operations (necessary for liability release) in accordance with La R.S. 30:1109. However, as noted in La R.S. 30:1109.A.2, release of liability won't apply to the owner or last operator of record if it turns out that the CDGSTF balance for that site contains inadequate funds to address any issues that arise after the certificate of completion is issued post closure. The $5,000,000 cap on contributions from a particular operator won't hinder the commissioner in calling required financial surety documents (which again is separate) or from seeking payment into the CDGSTF from the owner/operator of record if the current CDGSTF balance isn't enough to cover something in that post closure period for the facility in question.

Questions for LDNR:

- Under the relevant Louisiana statute and regulations, can LDNR issue a certificate of completion pursuant to R.S. 1109 before LDNR approves site closure?
    - The statute (R.S. 1109) seems to contemplate issuance "after cessation of injection," not after LDNR approves site closure (which can happen decades later). Similarly, LDNR's regulation also seems to contemplate issuance before site closure (by requiring sufficient financial surety with LDNR to adequately close the facility, plug wells, and provide for post-injection site care and site closure).

LDNR: First, it should be noted that La. R.S. 30:1109 was enacted in 2009 prior to EPA's adoption of its Class VI regulations the following year. Therefore, unsurprisingly, its language does not contemplate nor specifically address any requirements found in EPA's rules one way or the other. Despite this, however, nothing in La. R.S. 30:1109 requires it to be implemented in a manner inconsistent with EPA's Class VI requirements and for the reasons set forth herein Louisiana's program will protect USDWs to the same or to a greater extent than EPA's Class VI program.

Second, La. R.S. 30:1109(A)(1) cannot be read in a vacuum, but instead must be considered in light of other Constitutional, statutory, and regulatory authorities and requirements. One such statutory authority is found at La. R.S. 30:1106(A) which states, "[t]he commissioner shall have authority to perform any and all acts necessary to carry out the purposes and requirements of the federal Safe Drinking Water Act." Such acts the commissioner may perform include decisions on applications for certificates of completion of injection operations when such a decision is necessary to ensure compliance with the federal Class VI program. In furtherance of this authority, the commissioner commits to coordinate with EPA prior to granting any certificate of completion of injection operations to ensure doing so is consistent with the requirements of the federal Safe Drinking Water Act. In addition to coordinating with EPA, interested parties and the public will have a meaningful opportunity to provide input in the process as well. Issuance of the certificate of completion with a limited release of liability pursuant to La. R.S. 30:1109(A) would only occur after public notice and hearing in accordance with La. R.S. 30:1105 in the parish where the storage facility is located. Additionally, pursuant to La. R.S. 30:12, the issuance of any certificate of completion is subject to judicial review upon an appeal by any aggrieved party, including the USEPA.

The commissioner's authority under La. R.S. 30:1106 further combines with his obligation and commitment to enforce the provisions of LAC 43:XVII.3633 and CFR Title 40, § 146.93 as set forth in the Memorandum of Agreement Addendum 1 between the LDNR and the USEPA Region 6 which was executed on September 17, 2021 by the Louisiana Commissioner of Conservation and on May 11, 2022 by the USEPA Regional Administrator, R6. This addendum states, in part,

I.C Conformance with Laws and Regulations

> The Louisiana Injection and Mining Division (IMD), a division within LDNR, shall administer the Class VI UIC program consistent with the state's submission for program approval, the program MOA, this Addendum, the Safe Drinking Water Act (SWDA), current federal policies and regulations, promulgated minimum requirements, priorities established as part of the annually approved state UIC grant, state and federal law, and any separate working agreements which shall be entered into with the Regional Administrator as necessary for the full administration of the Class VI UIC program.

Thus, the commissioner is not only authorized but clearly obligated to implement La. R.S. 30:1109 in a manner consistent with the federal requirements.

Third, La. R.S. 30:1109(A)(1) states that issuance of a certificate of completion is to take place "[t]en years ***or any other time frame established by rule.***" Thus, this provision is modified by Louisiana's Class VI rules dated January 20, 2021. This specifically includes LAC 43:XVII.3633 that requires sufficient financial surety to "adequately close the facility, plug all existing wells, and provide for post injection site care and site closure" prior to issuance of a certificate of completion of injection operations. Such financial security is required to be maintained by the operator until site closure of the facility is approved in accordance with LAC 43:XVII.3609(C)(4)(f). Therefore, even if after consultation with EPA it is agreed that issuance of such a certificate may occur consistent with the Safe Drinking Water Act prior to full closure of the facility; the operator of record is required to maintain financial surety until full closure of the facility under Class VI requirements takes place.

Fourth, LDNR interprets the requirements of La. R.S. 30:1109(A) that, prior to issuance of a certificate of completion of injection operations, it be demonstrated that "the reservoir is reasonably expected to retain mechanical integrity and the carbon dioxide will reasonably remain emplaced, at which time ownership to the remaining project including the stored carbon dioxide transfers to the state" is substantially similar to the requirements of the federal and state Class VI requirements for facility closure. Additionally, in both the case of facility closure under Class VI regulations and in carrying out the decision to issue a certificate of completion of injection operations, Louisiana Constitution art. IX, sec. 1 requires LDNR to ensure that it protects the environment and natural resources, as well as, the health, safety, and welfare of the people. Due to the construction of some legacy wells, aka artificial penetrations (AP's), within the area of review (AOR) some wells may pose a greater threat to the health, safety and welfare of the public than to the USDW. The LDNR is mandated to protect both. All of this combines to mean that LDNR cannot issue a certificate of completion of injection operations unless it determines that the risk a storage facility may pose to the USDW or the health, safety and welfare of the public is no greater than that which is contemplated by federal Class VI requirements.

Finally, as is discussed in greater detail in our answer to the next question, Louisiana law establishes a Carbon Dioxide Geologic Sequestration Trust Fund (CDGSTF) to address any future obligations that may arise after issuance of a certificate of completion of injection operations, which provides an additional layer of protection beyond what exists in the federal UIC program. In the event the CDGSTF is insufficiently funded to address these obligations, then the State is authorized to go back to the last operator of the carbon storage facility to ensure compliance with the Class VI requirements.

For the reasons set forth above, Louisiana's program will ensure equivalent or greater protection of USDWs as the federal requirements.

- If LDNR can issue a certificate of completion before LDNR approves site closure:

- How would this be squared with 40 CFR 146.85(b)(1) and 43 La. Admin. Code Pt XVII, 609.C.4.f? Those provisions require the o/o to maintain financial responsibility until the Director approves site closure, whereas the certification of completion releases the o/o from "any and all duties or obligations" (La R.S. 30:1109.A.1)—including, presumably, financial responsibility obligations.

Please see answer above. This rule modifies the limited release of liability found in La. R.S. 30:1109(A)(1), creating a condition precedent to being issued such certificate. The certificate of completion and any release of liability will not occur until the operator is compliant with the obligation to establish and maintain sufficient financial surety to assure adequate final closure of the facility in accordance LAC 43:XVII.3633. Again, this requirement survives the issuance of a certificate of completion of injection operations.

- How would Louisiana's approach be as stringent as the federal approach of requiring the o/o to maintain financial responsibility until the Director approves site closure?

In addition to the answers above, attached you will please find the Louisiana cross-walk comparing federal rules with Louisiana rules. This attachment is part of the primacy application, but is focused upon differences between the respective rules and areas in which the Louisiana rules are more restrictive that the federal counterpart.

- In LDNR's 2020 clarification, LDNR explained that the liability release in La R.S. 30:1109 "will not apply to the owner or last operator of record of a storage facility if the Carbon Dioxide Geologic Storage Trust Fund has been depleted of funds such that it contains inadequate funds to address or remediate any duty, obligation, or liability that may arise after issuance of the certificate of completion of injection operations." La R.S. 30:1109.A.2. If the CDGSTF fund does indeed become depleted in the future, how could LDNR ensure that the former o/o still has the funds to address any issues that arise after the certificate was issued? The issuance of the certificate has already released the o/o from "any and all duties or obligations" (La R.S. 30:1109.A.1)—including, presumably, financial responsibility obligations.

The Carbon Dioxide Geologic Storage Trust Fund is an additional surety to address any potential issues that may arise after site closure pursuant to LAC 43:XVII.3633 and Title 40, § 146.93. This is more restrictive than the federal rule found at CFR Title 40, 146.85 which provides for the release of all financial surety after final site closure. Because there are no guarantees of the operator remaining solvent after site closure, the state of Louisiana has provided for this additional surety to address potential unforeseen future issues.

- LDNR's clarified in 2020 that the $5,000,000 cap on contributions from a particular operator won't hinder the commissioner in calling required financial surety documents. But if the operator is already released from "any and all duties or obligations" (La R.S.

30:1109.A.1)—including, presumably, financial responsibility obligations—is the operator still obligated to have financial surety documents?

Please see the answers above. The requirement to maintain financial surety survives and is a condition precedent to being issued a certificate of completion of injection operations. Except for the $5 million in the Carbon Dioxide Geologic Storage Trust Fund, which will be held indefinitely, financial surety required pursuant to LAC 43:XVII.3609 and CFR Title 40, § 146.85 will not be released until the operator is compliant with the requirements of LAC 43:XVII.3633, the permit, and CFR Title 40, § 146.93 which is consistent with the requirements of the USEPA.